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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 175

CONGRESS CONSTRUCTION CORP., *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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May 31, 1963

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CONGRESS CONSTRUCTION CORP., *Petitioner*

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Claims dismissing its petition.

OPINION BELOW

The opinion and judgment of the Court of Claims is reported at 314 F. 2d 527 (1963). It is set out in Appendix A, *infra,* p. 1a to p. 10a.

JURISDICTION

The judgment of the Court of Claims (Opinion, Appendix A, *infra,* p. 10a) was entered on March 6, 1963. A petition for rehearing was not filed by petitioner and the time for filing such petition has expired. The jurisdiction of this Court is invoked under 28 U.S.C. (1958 ed.), Sec. 1255 (1)

QUESTION PRESENTED

Where an Act of Congress requires that, prior to acquisition by the United States of real property for the use of the Department of the Navy, the Secretary of the Navy "shall come into agreement" with the Committees on Armed Services of the Senate and the House of Representatives; and where the Secretary of the Navy, by contract with petitioner herein, agreed to seek approval of such Committees of a proposed real property acquisition, may an Assistant Secretary of Defense, without authorization by statute or by valid delegation from the Secretary of Defense, prohibit the Secretary of the Navy from carrying out such contract obligation and from performing the function vested in him by such Act of Congress, thereby precluding the Armed Services Committees from passing upon the real property acquisition without making the United States liable in damages to petitioner?

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set out in Appendix B, *infra*. They are:

REAL PROPERTY TRANSACTIONS BY MILITARY DEPARTMENTS (Appendix B, *infra*, p. 27a), Act of September 28, 1951, Public Law 155, 82nd Congress, Ch. 434, Title VI, Sec. 601; 40 U.S.C. (1952 ed.) Ch. 11, Section 551.

MILITARY HOUSING INSURANCE, "WHERRY ACT" (Appendix B, *infra*, p. 27a), 12 U.S.C. (1952 ed.) Ch. 13, Subchapter VIII, Section 1748b, (b) (2).

NATIONAL SECURITY ACT AMENDMENTS OF 1949 (Appendix B, *infra*, p. 28a), 5 U.S.C. (1952 ed.) Ch. 2A, Section 171a (b), (c)(4) and (f); Section 171c (b); and Section 171z.

REORGNIZATION PLAN NO. 6 of 1953, effective June 30, 1953 (Appendix B, *infra*, p. 29a); 18 Federal Register 3743, 5 U.S.C. (1952 ed.) Section 133z, Supplement V, Vol. 1 at p. 56.

STATEMENT OF THE CASE

The facts are not in dispute. Findings of Fact are stated by the Court of Claims following the Opinion, Appendix A, *infra*, p. 10a to p. 26a. The essential facts are as follows:

Petitioner was the sponsor of a "Wherry" housing project for the construction and operation of a housing project for military personnel. The project never came to fruition solely because the Armed Services Committees of the House of Representatives and of the Senate did not pass upon and approve the proposed acquisition by the United States of the real property needed therefor. As sponsor, petitioner expended the sum of $220,467 in preparing the project and in the Court of Claims sought unsuccessfully to recover that sum. The amount thereof and the essentiality of the items which composed it were not disputed.

Jurisdiction of the Court of Claims was invoked under 28 U. S. Code (1958 ed.), Sec. 1491.

Approval by the Armed Services Committees of the House and Senate of a proposed purchase of land for a "Wherry housing" project was required by Section 601 of Public Law 155, of September 28, 1951. (Appendix B, *infra*, p. 27a). The pertinent part of Section 601 of Public Law 155 reads as follows:

> The Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy . . . or his designee, shall come into agreement with the Committee (sic) on Armed Services of the Senate and

> of the House of Representatives with respect to those real estate actions by or for the use of the military departments . . . that are described in subsections (a)-(e) of this section and in the manner therein described.
>
> (a) Acquisitions of real property where fee title is to be acquired for an amount estimated to be in excess of $25,000 . . .

The intervention of an Assistant Secretary of Defense prevented the proposed acquisition from even being considered by the Committees.

Early in 1950, the Department of the Navy invited proposals from contractors for the construction and operation of a large housing project for military personnel. The project was to be constructed and operated by the contractor selected and was to be privately financed by a mortgage loan insured by the Federal Housing Administration under the provisions of an addition (Appendix B, *infra*, p. 27a) to the National Housing Act. Petitioner was selected by the Department of the Navy as the contractor or "sponsor", and the Secretary of Defense authorized the Secretary of the Navy to negotiate directly with petitioner, and furnished the certificate to the Commissioner of the Federal Housing Administration required by statute (Appendix B, *infra*, p. 27a). See Defendant's Exhibit 7 (Appendix C, *infra*, p. 36a).

Negotiations between petitioner, the Department of the Navy and the Federal Housing Administration, as guarantor of the mortgage loan, continued for over two years. Late in June of 1953, the Navy came into agreement with petitioner on the essential terms involved in the project (Opinion, Appendix A, *infra*, p. 3a and p. 5a). These included certain land for the site owned by petitioners. The only thing remaining to be done

was for the Secretary of the Navy, or his designee, to present the proposed real property acquisition to the Armed Services Committees and to secure their approval. Implicit in the arrangements with petitioner was the Navy's undertaking to present such proposed land acquisition to the Committees and to urge approval thereof.[1]

It was understood at all times by petitioner and the Department of the Navy that the purchase of the land by the United States and the subsequent construction of the project itself was contingent upon approval of the real property acquisition by the Armed Services Committees of the House and Senate. The court below refers to this condition precedent as "an indispensable pre-condition to the consummation of the project." (Opinion, Appendix A, *infra*, p. 3a).

Late in July 1953 the representative of the Secretary of the Navy submitted to each of the Armed Services Committees an application for approval of the acquisition of the land. A preliminary hearing was held by a Subcommittee of the House Committee. It adjourned without action on the application. No hearing was ever held by the Senate Committee. Aside from this preliminary hearing by the House Subcommittee, no further hearings were ever held. This result was the direct consequence of action taken by the Assistant Secretary of Defense for Properties and Installations. In September 1953, this Assistant Secretary notified the service secretaries that he "requested" all proposed purchases of land within the

[1] The lower court stated: "We pass over this issue, assuming *arguendo* that the Navy was legally bound to plaintiff to make a good faith attempt to persuade the Committees, once plaintiff and the Navy had come to terms." (Appendix A, p. 5a).

scope of Public Law 155 sec. 601, to be forwarded to his office for prior clearance. (Defendant's Exhibit 49; Appendix C, *infra*, p. 31a).

The petitioner was not advised of this requirement of the Assistant Secretary until long after agreement with the Navy on the terms of the contract had been reached. (Finding 11, Appendix A, *infra*, p. 15a). It was not published in the Federal Register.

For some eight years prior to the matters considered here, the established procedure of the Department of the Navy for acquisition of real estate was to obtain the approval of the Congressional Naval Affairs Committees. (Finding 11, Appendix A, *infra*, p. 14a). No Department of Defense approval had ever been required.

The Department of the Navy endeavored to comply with this new requirement and to get permission from the Assistant Secretary of Defense to submit the proposed acquisition to the Armed Services Committees, all without success. As a consequence, the Department of the Navy was obliged to withdraw consideration of the proposed acquisition of land from both Committees without having had an opportunity to recommend approval and without permitting the Armed Services Committees even to consider the matter.

We believe the action of the Assistant Secretary of Defense was unlawful and constituted a breach of the contract between the United States and petitioner for the construction of the housing project, one essential element of which was the Navy's undertaking to submit the proposed acquisition to the Armed Services Committees and to urge approval thereof. The question is not here presented as to the power of the Secre-

tary of Defense himself to have intervened for it was not the Secretary, but an Assistant Secretary, who intervened.

The lower court undertook to justify this high-handed action of the Assistant Secretary by attempting to establish that lawful authority passed from the Secretary of Defense to the Assistant Secretary (Properties and Installations).

A summary of the statutory powers of the Secretary of Defense follows, from which it will be seen that the Assistant Secretary's action was unlawful.

The National Security Act Amendments of 1949 (Appendix B, *infra*, p. 28a) undoubtedly placed the administration of the Department of the Navy in the hands of the Secretary of the Navy but under the direction, authority and control of the Secretary of Defense. The latter was authorized to delegate any function vested in him to such officials of the Department of Defense as he might designate. Included among such officials were the three (later six additional) Assistant Secretaries of Defense. The Assistant Secretaries were to perform such duties and exercise such powers as the Secretary of Defense might prescribe. The Assistant Secretaries had no authority except as delegated to them by the Secretary of Defense.

The statute further provided that the Secretary of Defense shall maintain direct surveillance over the planning and construction by the military departments of all "public works", such surveillance to be maintained by the Director of Installations. (Appendix B, *infra*, p. 29a). The latter's duty was to report from time to time to the Secretary of Defense with respect to public works projects under construction by the

military departments and to keep the Secretary of Defense fully informed. The Director of Installations was given no authority whatever to issue orders to the Secretary of the Navy, change procedures for real property acquisitions or interfere with the statutory duties of the Secretary of the Navy or of the Armed Services Committees under Public Law 155, sec. 601. Nor did the Director of Installations attempt to do so.

Reorganization Plan No. 6, effective June 30, 1953 (Appendix B, *infra*, p. 29a) transferred the functions of the Director of Installations to the Secretary of Defense. It provided for six additional Assistant Secretaries of Defense to perform such functions as the Secretary of Defense might prescribe. It further provided that the Secretary of Defense might authorize the performance by any officer of the Department of Defense of any of his functions, including any function transferred to the Secretary of Defense by Reorganization Plan No. 6.

The foregoing reference to the statutory duties and powers of the Director of Installations discloses that he had only limited functions of surveillance and reporting. In its Opinion, the lower court states that "the Secretary passed these powers on to the Assistant Secretary for Properties and Installations." (Appendix A, *infra*, p. 8a). The lower court does not disclose the basis for its conclusion.

A search of the Record below produces but one document bearing upon the authority of the Assistant Secretary of Defense in 1952-1953, namely, Defendant's Exhibit 96 (Appendix C, *infra*, p. 33a).

Defendant's Exhibit 96 was designated "Department of Defense Directive", dated August 13, 1953

and was entitled "Responsibilities of the Assistant Secretary of Defense (Properties and Intsallations)." It was issued by the Secretary of Defense pursuant to the National Security Act of 1947, as amended, and Reorganization Plan No. 6 of 1953. It enumerated the Assistant Secretary's "responsibilities". These included, *inter alia*, developing policies and procedures in the broad field of real estate acquisition and family housing; developing uniform plans and policies in the provision and administration of family housing for the services; and standards and cost criteria for family housing and reporting from time to time to the Secretary of Defense. Defendant's Exhibit 96 then provided:

> Directives recommended by the Assistant Secretary of Defense (Properties and Installations) *which intend to change established policies or procedures will be signed by the Secretary or Deputy Secretary of Defense* . . . (Emphasis supplied).

This Department of Defense Directive (Defendant's Exhibit 96) was not published in the Federal Register.[2]

It is apparent from the foregoing that the action of the Assistant Secretary of Defense in insisting upon "clearance" by his office of proposed land acquisitions changed an established policy and a recognized procedure in the Department of the Navy. It could not have been valid without the signature of the Secretary or the Deputy Secretary of Defense. Defendant's Exhibit 96 did indeed pass the powers of the former Di-

[2] On March 8, 1954, a "Department of Defense Instruction" (Defendant's Exhibit 66, Certified Record; not printed in Appendix C) provided *inter alia* that "no real property action will be submitted to the Committees without the approval of this office." This was not published in the Federal Register.

rector of Installations to the Assistant Secretary of Defense, but *it did not lodge in the Assistant Secretary of Defense any power or authority to take the action complained of.*

It is clear that, wholly aside from any question of contract law, the decision of the lower court puts any person contracting with the Department of Defense under a new and intolerable burden. This is so because, after reaching agreement with the Navy official held out to him as the duly designated contracting officer, such person must nevertheless ascertain, at his peril, that the Secretary of Defense personally, or some other official superior to the contracting officer, has approved or will approve the agreement, even though the contractor has neither actual notice nor constructive notice (by publication in the Federal Register) of this requirement. We believe that the lower court erred in so deciding and that such error will disrupt the orderly, established procurement practices not only of the Department of Defense but of all other executive departments and independent agencies. We believe, in addition, that the lower court erred in holding that a contract entered into by an authorized official may be nullified, without liability for damages, by subsequent acts of a superior official, which are not acts of sovereignty. We believe that these errors of the lower court present questions of sufficient importance to call for the exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

1. As we have pointed out, Public Law 155, Section 601 (Appendix B, *infra*, p. 27a) reposed in the Armed Services Committees the function of "coming into

agreement" with the Secretary of the Navy in respect of proposed real property acquisitions for the use of the Department of the Navy. Congress obviously decided to supervise these purchases through these Committees. But the lower court approved the exercise of this Congressional function by the Assistant Secretary of Defense and placed its sanction on his unlawful action. The Assistant Secretary of Defense could properly, through the Secretary of the Navy, have made known his views to the Committees. Instead, he arrogated the statutory function of the Committees to himself in derogation of Public Law 155. He encroached upon the legislative prerogative of the Congress, in whom alone reposed the power to make laws necessary to carry out its Constitutional powers, as expressed in Article 1, and Article 1, Section 8, Clause 18 of the Constitution.

It is, of course, basic that neither administrative officers of a department, nor the courts, may supply omissions or enlarge the scope of an Act of Congress. *Busey, Collector* v. *Deshler Hotel Co.*, 130 F. 2d 187, 190, CCA 6 (1942), citing *Iselin* v. *United States*, 270 U.S. 245. Even where a regulation is relied upon, if the regulation goes beyond the statute it is void, for the scope of Congressional enactment cannot be enlarged by a departmental regulation. *Commissioner of Internal Revenue* v. *Betts*, 123 F. 2d 534, 540, CCA 7 (1941). *A fortiori*, by the naked order of a Department official in contravention of the statute. It is the statute which finally governs. *Technicolor Motion Picture Corp.* v. *Westover*, 202 F. 2d 224, 227, CCA 9 (1953), citing *Royal Indemnity Co.* v. *United States*, 313 U.S. 289. The power to alter or repeal laws is a legislative power and executive officers may not by

means of rules and regulations, orders, or otherwise, extend, alter or disregard laws enacted by the legislature. *Peony Park Inc.* v. *O'Malley, Collector,* 121 F. Supp. 690, 695, D. C. Neb. (1954), aff. 223 F. 2d 668, CCA 8 (1955), cert. denied 350 U.S. 845.

The action of the Assistant Secretary of Defense resulted in the destruction of petitioner's contract rights. Such action was *not* an exercise of sovereignty but an act without justification in statute, administrative discretion or otherwise. In earlier decisions the Court of Claims has approved the principal that under these circumstances the mantle of sovereignty does not give the United States immunity from suit. *Ottinger* v. *United States,* 88 F. Supp. 881, 883, Court of Claims (1950)[3]; *Froemming Bros., Inc.* v. *United States,* 70 F. Supp. 126, Court of Claims (1947). Nor does it in the case at bar.

2. No citation of authority is necessary to establish that when a contracting officer of the United States (here the Chief of the Bureau of Yards and Docks of the Department of the Navy) has been delegated authority by the Secretary of the Navy to enter into a contract on behalf of the United States and does so, the United States is not relieved of its obligations under that contract if the Secretary of the Navy, the Secretary of Defense or even the President of the United States makes a subsequent determination that the Government shall not fulfill its obligations there-

[3] The case was first heard by the Court of Claims on demurrer to the petition. The demurrer was overruled, 88 F. Supp. 881. At the trial on the merits, the court, while approving the language it had used regarding sovereign acts of the Government, found that the facts showed that the Government acted in a sovereign capacity, and dismissed the petition, 106 F. Supp. 198.

under. In the case at bar, the Chief of the Bureau of Yards and Docks, pursuant to delegated authority, had entered into a contract with petitioner, subject to a condition precedent (approval of the Armed Services Committees). The terms of that contract required the United States to try to bring about the happening of such condition. The subsequent determination by an Assistant Secretary of Defense that the United States should not honor its obligation to try to bring about the happening of such condition no more relieved the United States of liability for breach than would have been the case had a breach of a simple bilateral agreement been involved. Contract obligations entered into by an authorized contracting officer of the United States within the scope of his authority may not be abrogated by a superior officer without subjecting the United States to damages for breach of contract.

3. The record establishes that the United States failed to fulfill its obligation to petitioner to seek approval of the Armed Services Committees for the acquisition of petitioner's land. Such obligation constituted a condition precedent to the finalization of the contract between the parties. There can be no question that when one party to a contract obligates himself to do all he can to bring about the happening of a condition, and then fails to do so, he cannot take advantage of such failure and ". . . any conditions which the facts show might have been performed . . . will be assumed would have been performed if the conduct of the promisor was such as to preclude the possibility of performance . . ." *Williston on Contracts*, Section 677, (Rev. Ed. 1936). See also *Wissahickon Realty Corp.* v. *Boyle*, 358 Pa. 198, 122 A.2d 720. The fact that an

Assistant Secretary of Defense prohibited the Secretary of the Navy from making a submission to the Armed Services Committees did not determine whether or not the Armed Services Committees would have approved the acquisition of the land. The opinion of such Assistant Secretary was no substitute for the action of the Committees. It follows that withdrawal of the acquisition application from Committees' consideration did not relieve the Government of the obligation to seek the Committees' approval nor did it, as the court below held, relieve the Government of liability for damages for breach of contract.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 31, 1963.

APPENDICES

APPENDIX A—Opinion, Findings, Conclusion of Law and Judgment

APPENDIX B—Pertinent Provisions of Statutes Involved

APPENDIX C—Defendant's Exhibits 49, 96
Plaintiff's Exhibit 7

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 535-59

(Decided March 6, 1963)

CONGRESS CONSTRUCTION CORPORATION

v.

THE UNITED STATES

John T. Koehler for the plaintiff. *John Paulding Brown, John Geyer Tausig, and Butler, Koehler & Tausig* were on the briefs.

Herbert Pittle, with whom was *Assistant Attorney General Ramsey Clark*, for the defendant.

Before JONES, *Chief Judge*; WHITAKER, *Judge*; LARAMORE, *Judge*; DURFEE, *Judge*; and DAVIS, *Judge*.

Opinion

DAVIS, Judge, delivered the opinion of the court:

Plaintiff was the potential sponsor of a "Wherry Housing Project" which never came to fruition because the Armed Services Committees of the Congress did not approve the acquisition by the Government of the land needed for the project. As such sponsor, plaintiff expended about $220,500 in preparation, and now seeks to recover that sum on the ground that the defendant failed to use its best efforts to obtain the required Congressional approval.

As the court has already pointed out (*Henry Barracks Housing Corp. v. United States*, Ct. Cl. No. 524-58, decided July 15, 1960, slip op. 3, 281 F. 2d 196, 197-98), the Wherry Military Housing Act—Title VIII of the National Housing Act, as added by 63 Stat. 570 (see also 64 Stat. 97, 65 Stat. 365); 12 U.S.C. (1952 ed.) § 1701, *et seq.*—was enacted to encourage private investors to engage in the construction of

rental housing for military and civilian personnel on duty at military installations. The legislation sought to remove the unattractive features of private investment in military housing through (i) a special form of mortgage insurance up to 90 percent of replacement cost; (ii) acquisition by the Government of the building sites, followed by a long-term irrevocable lease to the builder; and (iii) assurance that utilities would be provided the project on a long-term basis by the nearby military post. The sticking point in this case, as we shall see, was the acquistion by the Government of the project land for, under a general provision which Congress has long kept in effect, the military departments must "come into agreement" with the Armed Services Committees of the Congress before making fee-title acquistion of real property costing over a stated sum.[1]

This abortive Wherry Housing Project had its origin in 1950, when the Navy requested various builders to submit proposals for the housing of naval personnel in the Alameda-Oakland area of California. In the spring of 1952, the Navy determined that a tract owned by plaintiff[2] offered the best possibilities, and by the end of July, 1952 authoriza-

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[1] The Act of September 28, 1951, Chapter 434, Title XI, Sec. 60; 65 Stat. 366, 65 Stat. 365, 40 U.S.C. (1952 ed.) § 551, formalized this requirement as follows:

"The Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy, . . . as the case may be, or his designee, shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real estate actions by or for the use of the military departments . . . that are described in subsections (a) through (e) below, and in the manner therein described:

(a) *Acquisition:*

Acquistions of real property where fee title is to be acquired for an amount estimated to be in excess of $25,000 . . .".

[2] For convenience, we shall refer only to plaintiff, although certain of the transactions were carried on by plaintiff's corporate subsidiaries or the individual who controlled plaintiff.

tion was given the local naval official to negotiate with with plaintiff for a 500-unit Wherry housing project on this land (which the Government would purchase). During the latter part of 1952, as part of these negotiations, plaintiff submitted to the Navy and the Federal Housing Administration (which had to approve the project if mortgage insurance were to be given) plot plans and building layouts. These were tentatively approved, and plaintiff's formal proposal was made to the Navy on December 10, 1952. After some modifications, the Navy informed plaintiff at the end of February 1953 that the proposal was "generally acceptable." At the end of May 1953 the Navy gave plaintiff the required "Certification of Need" which was a prerequisite to financing through F.H.A.; this certification was made contingent on Navy ownership of the site (which was to be acquired from plaintiff) and it was pointed out that Congressional clearance would be needed for the acquisition: the plaintiff was told that if it chose to go ahead with F.H.A. financing "you must assume the risk of the Navy obtaining favorable action by Congressional Committees for acquisition of the site." By the end of June 1953, the F.H.A. agreed to insure the mortgage on the project if it should ultimately be under taken.

Both plaintiff and the Navy understood all the while that an indispensable pre-condition to the consummation of the project was the approval by the Senate and House Armed Services Committees of the purchase of the land from the plaintiff. The Navy came into agreement on terms with plaintiff and prepared the data necessary to obtain the Congressional consent, but it was always clear to both parties that the purchase and the project each hinged on Congressional approval of the land acquisition. The Navy told plaintiff that it "cannot officially accept your offer [relating to the land] nor commit the Navy in any way to such acceptance until the land is approved for acquisition by Congressional Committees"; on the Navy's insistence,

plaintiff revised its offer relating to the land so that it was explicitly made subject to the Committees' agreement.

On July 29, 1953, the Navy submitted this land acquisition proposal to the Assistant Secretary of Defense for approval; two days later, on July 31st, the Navy forwarded it to both the Senate and the House Committees. Until early 1953, it had been the Navy's practice to submit its real estate transactions directly to the Congressional Committees, without clearing through the Department of Defense. Late in 1952 or early in 1953, however, a director of Installations and Logistics (later the Assistant Secretary of Defense for Properties and Installations) was established in the Office of the Secretary of Defense to review all construction projects and property acquisitions (see footnote 6, *infra*). In February 1953 the Senate Committee informed the Defense Department that it desired that all future requests for committee approval should indicate the concurrence of the Secretary of Defense. Thereafter, the Navy submitted all pending and all new projects to the Secretary. It was pursuant to this changed practice that the Navy forwarded to the Defense Department (in July 1953) the acquisition in which plaintiff was interested. Early in September 1953, the Assistant Secretary of Defense formally required the Navy to submit to him for prior clearance all real estate transactions which had to go to the Congressional Committees.

The gist of the subsequent history is that, despite a full-scale effort by the Navy to convince him,[3] the Assistant Secretary of Defense would not approve the acquisition from plaintiff of the site necessary for the housing project. This led to a checkmate since the Congressional Committees would not proceed to final consideration of the purchase in the absence of further stimulation by the Navy, and the Navy felt itself precluded from urging acceptance upon the

[3] Plaintiff concedes that the Navy used its best efforts to obtain the approval of the Department of Defense.

Committees until it had obtained clearance from the Defense Department. Ultimately, when it became clear that this higher-echelon approval would not be forthcoming, the Navy formally requested the Committees to permit withdrawal of the proposal (in April 1954). The result was that the entire Wherry Housing Project, of which the land acquistion was an inseparable part, failed to come to life.

Recognizing that the purchase of the land was always contingent upon approval by the Congressional Committees, plaintiff does not assert that the mere failure of the Committees to approve the transaction gave rise to any liability on the Government's part. The primary claim is, rather, that the Navy obligated itself to plaintiff to use its best efforts to obtain such approval, and broke that promise by not going forward before the Committees even though the Defense Department withheld its consent.

At the outset, there is a substantial question, which we leave undecided, whether the Navy *obligated* itself to do anything toward bringing the negotiations to completion. It is clear that there was a coming-together of the Navy and plaintiff on the terms and scope of the proposal, but though it was expected that the Navy would present the matter to the Committees no such express undertaking was given. Perhaps a subsidiary agreement to press further in good faith can be implied, but on the other hand it may be that no legal rights at all,—no binding agreement of any kind—would arise until final acceptance by the Committees (see *Kilmer Village Corp.* v. *United States*, 139 Ct. Cl. 231, 234-235, 236, 153 F. Supp. 393, 396, 397 (1957)).[4] We pass over this issue, assuming *arguendo* that the Navy was legally bound to plaintiff to make a good faith attempt to persuade the Committees, once plaintiff and the Navy had come to terms.

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[4] See also, *Carmick* v. *United States*, 2 Ct. Cl. 126, 135 (1866); *Darragh* v. *United States*, 33 Ct. Cl. 377, 391 (1898); *Cathell* v. *United States*, 46 Ct. Cl. 368, 371 (1911).

Was this obligation breached because the Navy, bowing to the will of the Defense Department, did not urge approval by the Committees? The plaintiff says that the Defense Department encroached onto an area which, by statute and practice, was solely the Navy's, and therefore that the Navy had no legal excuse to submit. It is true that the negotiations were carried on by (or on behalf of) the Secretary of the Navy and that the statute forbidding Navy land acquisition without Congressional consent (see footnote 1, *supra*) speaks of the Navy's Secretary coming into agreement with the Committees, without mentioning the Secretary of Defense. But when purely executive functions of a discretionary nature are imposed on a subordinate official of the Government it is an implied condition that his actions (before they have become final) are subject to the review and supervision of his superiors—if the superior is authorized to intervene in that particular field and does so in time. Cf. *Darragh* v. *United States*, 33 Ct. Cl. 377, 392 (1898). So far as the Presidency is concerned, this is a necessary corollary of *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926), holding that Article II of the Constitution "grants to the President the executive power of the Government, i.e., *the general administrative control of those executing the laws*, including the power of appointment and removal of executive officers * * *" (emphasis added). Cf. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 627-628 (1935); *Wiener* v. *United States*, 357 U.S. 349, 351 (1958).[5] If the acquisition of plaintiff's land had somehow been called to the President's attention, he would clearly have been within his power in directing the Secretary of the Navy not to seek acceptance of the transaction by the Congressional Committees. Although the statute does not refer to the Presi-

[5] See, also, *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803); *Wilcox* v. *Jackson*, 13 Pet. 498, 513 (1839); *United States* v. *Jones*, 18 How. 92, 95 (1856); *Runkle* v. *United States*, 122 U.S. 543, 557 (1887).

dent in terms, it is implicit in the legislation that he can direct the actions of his subordinate, whom Congress named; "the Secretary of the Navy represents the president, and exercises his power on the subjects confined to his department" (*United States* v. *Jones*, 18 How. 92, 95 (1856).

We think that in the circumstances of this case the Secretary of Defense had like authority. By June 1953 Congress had given the Defense Department sufficient power over the Navy so that it had the status of a full superior for the matters with which we are concerned. The Department of Defense had been established as an "Executive Department of the Government" and the Army, Navy, and Air Force as "military departments" "within" it. The Secretary of Defense was designated "the principal assistant to the President in all matters relating to the Department of Defense"; under the President's direction, and subject to certain restrictions (not now pertinent), "he shall have direction, authority, and control over the Department of Defense." The military departments were to be separately administered by their respective Secretaries, but "under the direction, authority, and control of the Secretary of Defense." Specially detailed provisions were made for Defense Department supervision and control over the budgetary and fiscal procedures and policies of the military departments. See Act of August 10, 1949, 63 Stat. 578, 5 U.S.C. § 171, *et seq.*

This broad range of statutory authority over the Navy would doubtless have been effective, in itself, to empower the Secretary of Defense (acting through his subordinates, as the law permitted him to do, 5 U.S.C. § 171a(f)) to review the Navy's acquisition of land for a Wherry Act project. But there was even more specific statutory delegation of power. A 1951 addendum to the Wherry Act (65 Stat. 365, 12 U.S.C. (1952 ed.) § 1748i), authorizing funds for land acquisitions for Wherry Act housing projects, expressly provided that "such funds may be expended

by the respective military departments for housing projects when the Secretary of Defense, after consultation with the Federal Housing Commissioner, determines that such housing projects should be constructed and that such expenditures are essential to the construction of satisfactory housing." In addition, as we have indicated, a Director of Installations was established in 1952-1953 in the office of the Secretary of Defense to oversee all construction projects and land acquisitions.[6] By Reorganization Plan No. 6 of 1953, effective June 30, 1953, 67 Stat. 638—which had the status of legislation—the functions of the Director were transferred to the Secretary of Defense, who was also authorized to delegate the functions to an Assistant Secretary; the Secretary passed these powers on to the Assistant Secretary for Properties and Installations.

In sum, the Department of Defense was endowed with undeniable supervisory control, general and specific, over the proposed purchase of land from plaintiff. The Assistant Secretary was not an interloper, nor did he trespass on the Navy's authority when he insisted on his right to approve the transaction. And under its authority the Defense Department was not limited to passing upon the need for the housing project, as plaintiff asserts, but could properly consider any and all factors, including the price to be paid for the land. As shown by both its general and its specific grants of authority, the Department had the full scope of a superior officer in the direct chain of command.

Since the Defense Department acted lawfully in taking cognizance of this proposed land acquisition, plaintiff is forced to contend that the Navy was nevertheless obligated

[6] This office was created by the Act of July 14, 1952 (Public Law 534), 66 Stat. 606, 625, which directed the Secretary of Defense to "maintain direct surveillance over the planning and construction by the military departments of all public works projects."

(by its assumed arrangement with plaintiff) to pursue the matter before the Congressional Committees. This cannot be. To interpret the Navy's implicit agreement to use its best efforts to obtain Committee approval as binding it to by-pass or overrule its superior would contravene a basic canon of proper public administration, acknowledged throughout the nation's history. Subordinates do sometimes seek to undermine their chiefs via the back-door, but it is hard to believe that an official would undertake to do so by a contract obligating the United States, or that such an agreement, if made, would be within the official's power. After the Defense Department took hold of the matter and indicated that its prior clearance was necessary before submission to the Congress, no Navy official could reasonably have been expected to appear before or press for action by either Committee.[7] That would be stark insubordination. We cannot construe the Navy's promise to use its best efforts to obtain Congressional approval—which we have assumed for this case—to include such unreasonable and improper conduct. It may well be that neither the Navy nor plaintiff foresaw the dominant role taken by the Secretary of Defense, but they must be held to have contracted in the light of that eventuality—foreshadowed by legislation then on the books.

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[7] Plaintiff does not rely on the provision of the act establishing the Defense Department which declares that "no provision of this Act shall be so construed as to prevent a Secretary of a military department or a member of the Joint Chiefs of Staff from presenting to the Congress, on his own initiative, after first so informing the Secretary of Defense, any recommendations relating to the Department of Defense that he may deem proper." 5 U.S.C. § 171a(e)(8) (formerly 5 U.S.C. § 171a(e)(6)). This section, obviously intended for important matters of policy, was not designed to encourage the military departments to "appeal" any decision of the Defense Department, no matter how minor, to the Congress. The Navy's agreement to use its best efforts would not include a promise to use the extraordinary avenue of communication opened by this section.

Plaintiff urges, alternatively, that the Navy Department undertook to vouch for the best efforts of the entire Executive Branch, not of the Navy alone. We find nothing, however, in the negotiations between plaintiff and the Navy to suggest that the latter agreed to bind the Defense Department or the President. Both parties appear to have left those superiors entirely out of consideration; at most, the Navy agreed to put forth its own best efforts. Even if the Navy did seek (in advance of the Defense Department's apprising itself of the facts) to constrain the latter to persuade the Committees, we know of no authority by which a subordinate official can bind a superior, who has not yet considered a matter which he has a right to see before final action, to take a certain position. That would turn the administrative hierarchy upside-down.

The plaintiff has not shown that any obligation to it undertaken by the defendant has been breached. Its expenditure of funds in anticipation of the final contract does not change the result. "It is probably the rule rather than the exception that money is spent and not recovered in circumstances where a contract is not consummated." *Kilmer Village Corp.* v. *United States*, 139 Ct. Cl. 231, 236, 153 F. Supp. 393, 397 (1957); see also *Abbell* v. *United States*, 143 Ct. Cl. 556, 561, 166 F. Supp. 602, 606 (1958); *Carmick* v. *United States*, 2 Ct. Cl. 126, 135 (1866).

Plaintiff is not entitled to recover. The petition will be dismissed.

Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner Roald A. Hogenson, and the briefs and arguments of counsel, makes findings of fact as follows:

1. Plaintiff is a Delaware corporation with its principal place of business at New York City. Since 1950, 30 percent of plaintiff's stock has been owned by Edmond C. O'Dris-

coll, 30 percent by O'Driscoll Corp., and 40 percent by George E. Stone, deceased.

All of the common stock of O'Driscoll Corp. is and was owned by Mr. O'Driscoll.

2. During the years 1950 to 1954, Alameda Bayside Construction Corp., Alameda Bayside Development Corp. I, and Alameda Bayside Land Corp., were wholly owned subsidiaries of the plaintiff corporation. The Alameda corporations were dissolved in 1959 and their assets were transferred to plaintiff.

3. In 1950, the Department of the Navy made a preliminary determination to certify construction of a 700-unit housing project under Title VIII of the National Housing Act for military personnel of the naval installations in the Alameda-Oakland area of California. On February 16, 1950, the Department of the Navy circulated a questionnaire to builder-operators advising them of such preliminary determination and inviting them to submit proposals and statements of their qualifications and experience in the construction industry, particularly with reference to the construction and operation of large multiple-unit housing projects. In that questionnaire the statement was made that the information requested by the Navy at that time was required only to enable it to determine whether builder-operators were properly qualified for the construction and operation of housing projects and that the Department reserved the right to select one or more of the applicants for a proposed project with or without further negotiation. The Department also reserved the right to reject any or all submittals.

4. During the year 1950, Edmond C. O'Driscoll acquired 40 acres of land in Alameda, California. He took title to 30 acres in his own name and title to 10 acres in the name of Alameda Bayside Land Corp. He paid approximately $50,000 provided by plaintiff for the entire tract. Most of

the tract was tideland, only 5 to 10 percent never being under water, with some always being under water, and some inundated during flood tide.

Mr. O'Driscoll held title to the 30 acres in his own name for convenience and was prepared to transfer such title to whichever corporation might be named as mortgagor to complete the necessary transactions in the event negotiations with the defendant culminated in agreement for construction and operation of the proposed Navy housing project on the tract. Mr. O'Driscoll did not enter into any agreement to transfer title to the 30 acres but retained such title until he transferred it to plaintiff in 1958.

The 19.2 acres of land, hereinafter mentioned in these findings, were part of the 30 acres owned by Mr. O'Driscoll.

5. In response to the questionnaire which it had circulated, the Department of the Navy received proposals from several contractors for the construction of the rental housing. Having acquired the 40 acres of land referred to, Mr. O'Driscoll responded to the questionnaire and through the plaintiff submitted a proposal in the summer of 1951 for the proposed housing project. The proposal submitted by the plaintiff at that time was rejected because it was determined that the Navy could not negotiate with a single sponsor who was the owner of the property and that the rentals proposed to be charged for the housing to be constructed were in excess of those which military personnel could pay. In addition, legislation was being considered at that time to subsidize housing projects under Title VIII of the National Housing Act of June 27, 1934, as amended August 8, 1949, and May 2, 1950, 63 Stat. 570, 64 Stat. 97.

6. As a result of discussions and further negotiations, the above-mentioned Alameda Bayside Construction Corp., hereafter referred to as Alameda, submitted a formal proposal dated December 10, 1952, to the Department of the Navy for construction and operation of a housing

project. Prior thereto, representatives of the Department of the Navy had determined that the tract which they believed was owned by Alameda offered the most desirable site and was considered feasible for the Title VIII housing project. Accordingly, by memorandum dated March 31, 1952, Captain H. F. Ransford, District Public Works Officer, Twelfth Naval District, hereinafter referred to as DPWO, requested the Chief of the Bureau of Yards and Dock to authorize the DPWO to commence negotiations with Alameda for the construction of a 500-unit Title VIII project.

7. By memorandum dated May 2, 1952, the Chief of the Bureau of Yards and Docks recommended that the Chief of Naval Operations obtain approval from the Secretary of Defense for the Bureau of Yards and Docks to enter into negotiations with Alameda, as requested by the DPWO.

8. By memorandum dated July 25, 1952, the Under Secretary of the Navy requested Mr. Thomas Coogan, Director, Armed Forces Housing Agency, an office established in the office of the Secretary of Defense, for approval to negotiate directly with Alameda for the development of 500 units of Title VIII housing.

9. By memorandum dated July 31, 1952, Mr. Coogan granted approval to negotiate the project. Thereafter, negotiations continued throughout 1952.

10. During the negotiations in 1952, plot plant and building interior layouts were submitted to the Department of the Navy and to the Federal Housing Administration and were considered by the DPWO to be sufficiently detailed for the Navy to determine whether a satisfactory project could be developed within Navy-approved rentals and within the appropriations for assistance not to exceed $500,000 for land acquisition and for construction of utilities. Such tentative drawings were approved by the San Francisco office of the Federal Housing Administration

subject to development of working drawings to be revised in such details as might be required to embody all currently effective FHA minimum property requirements. A copy of this stated position of the FHA was provided to Alameda by the DPWO in his transmittal letter dated October 31, 1952, in which Alameda was advised that such tentative plans were acceptable for developement of the project.

Proposals under consideration contemplated a Title VIII military housing project constructed with private capital and operated by private owners, financed by a mortgage loan insured by the Federal Housing Administration. This type of Title VIII housing generally referred to as Wherry housing, also contemplated the purchase of the site by the Government, after which the builder-operator would be obligated to lease the land and improvements for a long term and operate the project in accordance with contractual and statutory provisions.

11. From about 1943 until the act of September 28, 1951, 65 Stat. 365, the procedure followed by the Navy for acquisition of real estate for construction of real estate projects was to obtain the approval of the Congressional Naval Affairs Committees for such proposed projects.

Section 601 of the act of September 28, 1951, provides that the Secretary of the Army, the Secretary of the Air Force or the Secretary of the Navy, as the case might be, or his designee, "shall come into agreement with the Committee on Armed Services of the Senate and of the House of Representatives with respect to those real estate actions by or for the use of the military departments * * *." After the passage of that statute the Department of the Navy met the requirement to obtain the approval of the House and Senate Armed Services Committees for all proposed real estate acquisitions and followed the procedure of submitting directly to those committees requests for their approval without obtaining prior approval of the Secretary of Defense until the fall of 1952 or early 1953.

The representatives of plaintiff and Alameda knew at all pertinent times that it was necessary to obtain approval of the Senate and House Armed Services Committees for acquisition by defendant of the pertinent tract of land. In his opening statement at the trial, plaintiff's counsel conceded that "had the Navy reasonably endeavored to secure approval by the Armed Services Committees, and had the Armed Services Committees turned the Navy down, my client would not have been entitled to recover five cents, because that was the deal."

In the latter part of 1952 or early 1953, the office of the "Director of Installations and Logistics" was established in the office of the Secretary of Defense and all construction projects and real-estate acquisitions were reviewed by him on behalf of the Secretary of Defense. That office later became the office of the Assistant Secretary of Defense for Properties and Installations.

Plaintiff and Alameda were not advised that the office of Secretary of Defense would concern itself with the question of approval of the project until April 1954, although they learned that an Assistant Secretary of Defense traveled to the project area in late 1953 or early 1954 to investigate.

12. By letter dated February 26, 1953, the Chairman of the Armed Services Committee of the Senate informed the Secretary of Defense that that committee requested that future submittals for committee approval of real estate acquisitions should contain a paragraph indicating the concurrence of the Secretary of Defense. Prior to the receipt of that letter, the Department of the Navy had not followed any specific procedure for obtaining approval or concurrence of the Secretary of Defense but made such submittals directly to the congressional committees.

After the receipt of the letter of February 26, 1953, from the Chairman of the Armed Services Committee of the Sen-

ate, the Department of the Navy proceeded to have all of its projects which were then pending before the committee resubmitted to the Secretary of Defense for his approval. As these projects were approved by the Secretary, they were resubmitted to the committee.

13. During 1953, further negotiations occurred between Alameda and the Navy and the Federal Housing Administration.

On January 19, 1953, after review of Alameda's proposal for design construction, and management of a 500-unit project, the Chief of the Bureau of Yards and Docks advised the DPWO that the proposal was "generally acceptable with respect to site planning, building types, floor areas, dwelling unit plans and construction as indicated on preliminary plans," but that other aspects of the proposal would have to be modified before acceptance in its entirety.

On February 19, 1953, Alameda submitted an amendment to its proposal of December 10, 1952, based upon changes suggested at a meeting with representatives of the DPWO. Among the changes was a reduction from $700,000 to $500,000 of the defendant's appropriated fund assistance to the project to be provided under Public Law 155, 82d Congress. Alameda also submitted an amended FHA Project Analysis Form No. 2264W, dated February 19, 1953.

By letter dated February 27, 1953, the DPWO advised Alameda that its proposal as amended February 19, 1953, was "generally acceptable with respect to rental rates, appropriated fund assistance, site planning, building types, floor areas, dwelling unit plans and construction as indicated on preliminary plans."

By letter dated May 29, 1953, the DPWO transmitted to Alameda the Certification of Need concerning the proposed

project, signed by the Secretary of the Navy for Air, on May 14, 1953, and stated in part as follows:

> The "Certification" is valid subject to Navy ownership of the site. Acquisition of the site by the Navy is contingent upon securing Congressional clearances which may require 4 to 6 weeks. This office is presently obtaining information to forward to the Bureau of Yards and Docks to obtain the necessary Congressional clearances. In the event you desire to file an application for an FHA mortgage commitment in order that you might obtain such commitment prior to the 30 June expiration date of the Title VIII legislation, you must assume the risk of the Navy obtaining favorable action by Congressional Committees for acquisition of the site.
>
> The attached "Certification" is delivered upon the further condition that you will effect a closing with FHA for the construction of the project within 90 days of the receipt thereof.

The DPWO included the above-quoted language in his letter to Alameda pursuant to instructions from the Chief of the Bureau of Yards and Docks.

On June 26, 1953, the Federal Housing Administration filed its final Project Analysis concerning the proposed project, specifying the maximum insurable mortgage to be $4,206,000. On the same date, it issued its Commitment for Insurance to the extent of the maximum insurable mortgage, addressed to the Bank of Manhattan Company, the banking company with which Alameda had arranged for financing, with Mr. O'Driscoll named as sponsor and Alameda Bayside Development Corp. I as proposed mortgagor of the project.

Further revisions were made of the proposed project, and on July 17, 1953, the Assistant Secretary of the Navy

for Air issued an amended Certification of Need, reducing the specified average monthly rental per family from $88.63 to $80.15 on account of the exclusion of gas and electricity from the utilities included. Alameda Bayside Development Corp. I was therein named as the sponsor of the proposed project.

14. In the meantime, in May of 1953, the proposal for the Department of the Navy to acquire the site and proceed with the project was the subject of discussion by representatives of the Department of the Navy, and an inquiry on May 21, 1953, from a staff member of the House Armed Services Committee. The staff member was informed that a decision to proceed with the project had recently been made and that steps were being taken to obtain the necessary data from the DPWO for departmental and congressional clearances. The staff member also was informed that the sponsor was advised that congressional clearance had not yet been obtained and that in proceeding with plans and specifications the sponsor was assuming the risk that the congressional clearance might not be obtained.

15. The Department of the Navy proceeded to obtain and process the information and data necessary to obtain the approval of the congressional committees and, by memorandum dated June 12, 1953, to the Chief, Bureau of Yards and Docks, the DPWO furnished the statement of facts and data required. The DPWO advised that, because of the permanency of the proposed project, fee acquisition was essential and recommended that the land be purchased by the Navy "as is" and a contract be entered into for on-site improvements. The DPWO requested authorization to negotiate such a contract in an amount not to exceed the difference between $500,000 and the cost of the land "as is" (approximately $339,000) when the Bureau had obtained approval for site acquisition.

16. By letter dated June 18, 1953, Alameda informed the DPWO that it confirmed recent discussions relating to

a proposal for the sale of approximately 19.2 acres of land to the Navy. In that letter Alameda offered to sell the 19.2 acres proposed as the site for the housing project "as is" for the sum of $165,000 and to accept a lump sum contract in the sum of $335,000 to fill the land and install utility work.

17. By letter dated June 19, 1953, the DPWO acknowledged the offer of Alameda contained in its letter of June 18, 1953, and stated:

> This office cannot officially accept your offer nor commit the Navy in any way to such acceptance until the land is approved for acquisition by Congressional Committees and specific authority has been given this office by Bureau of Yards and Docks to enter into such agreements and contracts for land acquisition and site improvements as may be necessary. However, your offer is in substantial agreement with an appraisal made by this office, and it is believed the necessary approvals to enable this office to accept your offer will be forthcoming.
>
> The details of your offer were immediately forwarded to the Bureau for promptest action toward obtaining the Congressional approvals.

By letter dated June 19, 1953, Alameda informed the DPWO that the offer contained in its letter of June 18, 1953, was revised and that Alameda now agreed to sell to the United States Navy the 19.2 acres of land for $161,375, or a lesser amount, as its value might be determined by independent appraisal acceptable to it. In the revised offer of June 19, 1953, Alameda expressly stated that the proposal was subject to the respective approvals of the Bureau of Yards and Docks and the House Armed Services Committee for the acquisition of the site, and the issuance by the Federal Housing Administration of a commit-

ment for the project prior to June 30, 1953, satisfactory and acceptable to Alameda.

18. By memorandum dated June 22, 1953, E. H. Eaton, West Coast manager of the Wherry housing construction program for the Bureau of Yards and Docks, reported conversations on June 19, 1953, with the sponsor (Coates, secretary of Alameda), informing the sponsor that the Navy could not accept the terms of the proposal in the letter of June 18, 1953, from Alameda, unless the sponsor agreed, among other things, that the sale of the land to the Navy would be contingent upon receiving the approval of the House and Senate Armed Services Committees. Thereupon, Alameda submitted the revised proposal of June 19, 1953, and the DPWO on June 23, 1953, acknowledged receipt thereof, and stated that the "Bureau was immediately advised of your revised offer to enable it to prepare the Navy-sponsor option agreement mentioned by Mr. Eaton." In his memorandum, Mr. Eaton recited that he had advised the sponsor that the Navy could accept an option from the sponsor to sell the land "as is" on the conditions which Alameda did in fact include in its revised offer of June 19, 1953, set forth in finding 17.

On June 26, 1953, Alameda granted to defendant an option to purchase the 19.2 acres of land involved, the terms of which are not in evidence, but defendant never exercised such option.

In a report dated July 27, 1953, to the DPWO, an appraiser employed by the Navy stated that in his opinion the fair market value of the pertinent 19.2 acres of land on July 19, 1953, was $175,000 in its current status. Mr. Eaton through the Assistant Secretary of the Navy for Air advised the Assistant Secretary of Defense for Properties and Installations of this appraisal by memorandum dated September 2, 1953.

19. By memorandum dated July 29, 1953, the Chief of the Bureau of Yards and Docks requested the Assistant Secre-

tary of Defense to approve the project and its submission to the Armed Services Committees of the House and Senate.

20. By letter dated July 31, 1953, the Department of the Navy submitted to the Chairman of the Armed Services Committee of the Senate the land acquisition matter involved in the Alameda proposal, and advised the Chairman that the project had been submitted to the office of the Secretary of Defense and that his approval was anticipated within the next several days.

Also by letter dated July 31, 1953, the Department of the Navy submitted the land acquisition matter involved in the Alameda proposal to the Chairman of the Armed Services Committee of the House of Representatives.

Both submittals referred to above were accompanied by a detailed statement of the nature of the project and the proposals contemplated. Because of the pending adjournment of Congress the submittals were made to the Committees by the Navy about the same time that the Navy requested the Secretary of Defense to approve the project and the submittals.

21. On August 3, 1953, a subcommittee of the Armed Services Committee of the House of Representatives held a hearing to consider the submission and the request for approval by that committee. At the hearing Mr. Wilfred P. Tiencken, the head of the Realty Operations and Planning Section, Real Estate Branch, Property Administration Division, Bureau of Yards and Docks, Department of the Navy, testified in support of the request for approval of the project.

22. On August 5, 1953, the chairman of the subcommittee of the House Committee on Armed Services wrote to the Chief, Bureau of Yards and Docks, and informed him that no further action would be taken on the request for approval by that committee until there had been an oppor-

tunity for some of the members of the committee to survey the situation by visiting the site. The House Committee on Armed Services held no further hearings.

23. By memorandum dated August 11, 1953, the Assistant Secretary of Defense for Properties and Installations requested the Secretary of the Navy to submit detailed justification for the selection of the site proposed to be acquired for the project sponsored by Alameda and to furnish a fair market value appraisal (see finding 18) to permit him to review the project. The Assistant Secretary of Defense also requested the Secretary of the Navy to furnish a statement as to the determination made by the office of the Secretary of the Navy as to the essentiality of the project with the resubmission. Thereafter, by memorandum dated August 14, 1953, the Chief of the Bureau of Yards and Docks requested the DPWO to furnish additional information relating to a cost breakdown of the proposed acquisition of the site and other information, including a narrative report citing the advantages to be gained by the Navy and the sponsor, respectively, by the proposal.

24. By memorandum dated August 14, 1953, the Chief, Bureau of Yards and Docks, requested the Commandant, Twelfth Naval District, to furnish certain detailed information relating to the proposed acquisition and informed him that the site proposed for acquisition by the Navy had been questioned by the Armed Services Committees in regard to the cost per acre, including the estimated cost of necessary filling.

25. By memorandum dated August 21, 1953, the Acting Chief of the Bureau of Yards and Docks furnished the additional information regarding the breakdown of costs and other data to the Secretary of the Navy for resubmission to the Assistant Secretary of Defense for the approval by the Armed Services Committees of the House of Representatives and the Senate.

26. By memorandum dated August 27, 1953, the DPWO furnished to the Chief, Bureau of Yards and Docks, a detailed report containing additional data and cost of breakdowns as previously requested.

27. On September 2, 1953, the Assistant Secretary of the Navy for Air submitted another detailed memorandum to the Assistant Secretary of Defense for Properties and Installations containing additional data and information relating to the proposed acquisition. In that memorandum the Assistant Secretary of the Navy for Air expressly informed the Assistant Secretary of Defense that his office reaffirmed the need for the project.

28. By memorandum dated September 4, 1953, the Assistant Secretary of Defense informed the Assistant Secretary of the Navy that all real estate actions which required submission to the Armed Services Committees (except certain ones previously approved) had to be forwarded to the Assistant Secretary of Defense for prior clearance.

29. By letter dated September 15, 1953, Alameda informed the DPWO that in its opinion the nature of the proposed acquisition had not been correctly reported to the House Armed Services subcommittee. In that letter Alameda set forth a brief history of the proposed acquisition and furnished additional information which it believed would be helpful in obtaining approval of the project. The corporation stated that all plans had been completed and all approvals had been received except the approval of the Armed Services subcommittee.

30. By letter dated September 23, 1953, the DPWO acknowledged the letter of September 15, 1953, from Alameda and informed it that its letter had been forwarded to the Bureau of Yards and Docks.

31. By letter dated October 23, 1953, Alameda informed the Chief, Bureau of Yards and Docks, that a further extension on the mortgage commitment obtained under the

Federal Housing Administration sponsorship would be necessary and requested the Navy to obtain the extension from the mortgagee. On the same day, October 23, 1953, the Department of the Navy requested the Bank of Manhattan Company, the mortgagee, to extend the commitment and informed that company that the Department of the Navy intended to acquire the site and proceed with development of the project promptly upon receipt of the necessary congressional approvals.

32. On December 15, 1953, Messrs. Tiencken, Eaton and Mason, of the Department of the Navy, discussed the proposed acquisition with the Assistant Secretary of Defense at his request. The Assistant Secretary of Defense expressed the view that he was satisfied that the project was essential but that he felt the cost of the land was excessive and for that reason he was reluctant to approve the acquisition of the site. Thereafter, the Assistant Secretary of Defense requested additional data and personally visited the site proposed to be acquired. Representatives of the Department of the Navy continued to furnish information in an effort to obtain the approval of the Assistant Secretary of Defense.

33. By letter dated November 20, 1953, the Director, Real Property Management, office of the Assistant Secretary of Defense, informed the Director, Property Administration Division, Twelfth Naval District, that he was approving the acquisition of the site as proposed. However, by memorandum dated January 27, 1954, the Assistant Secretary of Defense informed the Chief, Bureau of Yards and Docks, that the request dated October 29, 1953, by the Chief of that Bureau for clearance of the proposed acquisition was disapproved, primarily because the indicated cost of acquisition was regarded as excessive for the intended purpose.

Thereafter, memoranda were prepared and discussions arranged by the representatives of the Department of the Navy for the purpose of obtaining the reversal of the

determination by the Assistant Secretary of Defense that the project was disapproved but with out avail.

34. By memorandum dated March 25, 1954, the Assistant Secretary of the Navy for Air was again informed by the Assistant Secretary of Defense that the proposal for the acquisition of the site had been reviewed and again had been disapproved. The memorandum of March 25, 1954, was discussed and concurred in by the Commissioner of the Federal Housing Administration. On April 5, 1954, the DPWO advised Alameda that the Assistant Secretary of Defense had disapproved the proposed land acquisition and that no further action was contemplated.

Thereafter, the Chairmen of the Armed Services Committees of the House of Representatives and the Senate were requested by letters dated April 9, 1954, to permit the withdrawal of the pertinent land acquisition proposal which had been submitted to them for approval; and by memorandum dated April 9, 1954, the DPWO informed the Chief, Bureau of Yards and Docks, that he had informed Alameda that the Assistant Secretary of Defense had disapproved the proposed acquisition and that the corporation had submitted an alternate proposal which was being considered. No progress was made, however, with respect to the alternate proposal.

35. No hearing on the pertinent land acquisition proposal was ever held by the Senate Armed Services Committee. In view of the position taken by the Assistant Secretary of Defense, as related in findings 23 and 28, neither Mr. Tiencken nor any Navy official could reasonably have been expected thereafter to appear before (or press for action by) either the Senate or House Armed Services Committee.

36. By letter dated April 28, 1958, to the Navy, Alameda submitted a claim and requested the Bureau of Yards and Docks to formalize the informal commitments made during the period of negotiations between representatives of the

parties. The request by Alameda was studied and considered by representatives of the Department of the Navy and, by letter dated October 15, 1958, that company was informed that the Department of the Navy could find no "informal commitment" and that relief under Title II of the First War Powers Act, as amended, Executive Order 10210, and Navy procurement directives for expenses incurred by Alameda in the sum of $218,373.80 could not be allowed.

37. By letter dated March 30, 1959, Minor Hudson, as attorney for Alameda, requested reconsideration of the claim and, after consideration, evidenced by a memorandum dated September 17, 1959, the Department of the Navy, on October 12, 1959, again informed Alameda, through its counsel, that the claim could not be allowed.

38. During the period March 1952 to April 1954, Alameda paid $220,467.04 for expenses in negotiating for the proposed contract and for preparing plans and specifications for the proposed construction.

Such expenditures were reasonably necessary to accomplish the proposed project, and had such project been approved and a formal contract executed and necessary mortgage loan arrangements completed, Alameda would have recovered such expenses in the normal drawdown of the proceeds of the mortgage loan.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is therefore dismissed.

APPENDIX B

Statutes Involved

The pertinent provisions of the statutes involved are as follows:

Real Property Transactions by Military Departments, Act of September 28, 1951, Public Law 155, 82nd Cong., Ch. 434, Title VI, sec. 601, 65 Stat. 366; 40 U. S. Code (1952 ed.) Ch. 11, Sec. 551.

Sec. 551—Agreements Between Secretaries of Military Departments . . . . and Armed Services Committees of Congress on Real Estate Transactions.

> The Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy . . . or his designee, shall come into agreement with the Committee (sic) on Armed Services of the Senate and of the House of Representatives with respect to those real estate transactions by or for the use of the military departments . . . that are described in subsections (a)-(e) of this section, and in the manner therein described.
>
> (a) Acquisition.
>
> Acquisitions of real property where fee title is to be acquired for an amount estimated to be in excess of $25,000. . . .

Military Housing Insurance, "Wherry Act", 12 U. S. Code (1952 ed.) Ch. 13, Subchapter VIII, Secs. 1748b, (b)(2).

Sec. 1748b(b)—Eligibility for Insurance.

> (2) The mortgaged property shall be designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force . . . No mortgage shall be insured under this subchapter unless the Secretary of Defense or his designee shall have certified to the Commissioner that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such

installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

* * * * *

National Security Act Amendments of 1949, 5 U. S. Code (1952 ed.) Ch. 2A, Secs. 171a(b),(c)(4), and (f); 171c(b) and 171z.

Sec. 171a(b). Principal Assistant to President; Control of Department of Defense.

> The Secretary of Defense shall be the principal assistant of the President in all matters relating to the Deparment of Defense. Under the direction of the President . . . he shall have direction, authority and control over the Department of Defense.

Sec. 171a(c)(4). Separate Administration of Military Departments.

> The Departments of the Army, Navy, and Air Force shall be separately administered by their respective Secretaries under the direction, authority and control of the Secretary of Defense.

Sec. 171a(f). Delegation of Authority.

> The Secretary of Defense may . . . perform any function vested in him through or with the aid of such officials or organizational entities of the Department of Defense as he may designate.

Sec. 171c(b). Assistant Secretaries of Defense . . . Powers and Duties.

> There shall be three Assistant Secretaries of Defense . . . The Assistant Secretaries shall perform such duties and exercise such powers as the Secretary of Defense may prescribe . . .

Sec. 171z. Director of Installations; Duties.

The Secretary of Defense shall maintain direct surveillance over the planning and construction by the military departments of all public works projects. Such surveillance shall be maintained through a civilian official of the Department of Defense to be known as the Director of Installations, who shall be appointed by and directly responsible to the Secretary of Defense . . . The Director of Installations shall, from time to time, make such reports directly to the Secretary of Defense with respect to public works projects under construction by the military departments as he may deem necessary to keep the Secretary of Defense currently and fully informed with respect to the status, progress, and cost of, and all other pertinent matters concerning such public works project . . .

Reorganization Plan No. 6 of 1953, effective June 30, 1953, 18 Fed. Reg. 3743; 5 U. S. Code (1952 ed.) Sec. 133z, Supplement V, Vol. 1 at p. 56.

DEPARTMENT OF DEFENSE.

Sec. 1—Transfers of Functions.

(a) All functions of . . . the Director of Installations are hereby transferred to the Secretary of Defense.

Sec. 2—Abolition of Functions.

The offices of the . . . and the Director of Installations are hereby abolished.

Sec. 3—Assistant Secretaries of Defense.

Six additional Assistant Secretaries of Defense may be appointed from civilian life by the President. . . . Each such Assistant Secretary shall perform such functions as the Secretary of Defense may, from time to time, prescribe . . .

* * * * *

Sec. 5—Performance of Functions.

The Secretary of Defense may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Defense of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

APPENDIX C

(Defendant's Exhibit 49)

Cancelled by 4165.12,
8 Mar. 54

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON 25, D. C.

DX-49 4 September 1953

Properties and Installations.

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (MATERIEL)

SUBJECT: Congressional Clearance for Real Estate Actions.

1. It is requested that all real estate actions which require submission to the Armed Services Committees under Title VI, Public Law 155, 82nd Congress, (except those projects approved under review of programs initiated by memorandum of 4 February 1953 from the Secretary of Defense), be forwarded to this office for prior clearance. The submission to this office will be accompanied by the project sheet in the form in which it will be forwarded to the Committees, including the identifying number. In addition the material facts which were used by your Department in determining the need for the projects will be submitted.

2. In those instances where land is being acquired for construction or for a purpose which comes within the purview of Department of Defense Directive 4000.8, "Basic Regulations for the Military Supply System", request for approval under paragraph III B 2 of that directive shall be submitted concurrently with the request for approval of the submission to the Committees.

3. Those land acquisition projects which do not require submission to the Committees but which are being acquired

for a purpose which comes within the purview of Department of Defense Directive 4000.8 shall also be submitted to this office for approval.

4. It is desired that projects be submitted timely in order that this office may have a sufficient period in which to make a determination.

(signed) FRANKLIN G. PLOETZ

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* *Note:* Identical memo sent to D/N and D/AF with the addition of following opening paragraph on D/AF memo: Reference is made to memorandum dated 21 August 1953 from Headquarters United States Air Force concerning the submission of land items to the Armed Services Committees.

Stamp on back of original exhibit as follows:

In the U. S. Court of Claims
Congress Constr. Corp.
v. *United States* No. 535-59
DEFTS EX. NO. 49

(Pertinent Provisions of Defendant's Exhibit 96 Are as Follows:)

13 August 1953
NUMBER 5131.1

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Responsibilities of the Assistant Secretary of Defense (Properties and Installations)

Pursuant to the authority vested in me by the National Security Act of 1947, as amended, and by Reorganization Plan No. 6 of 1953, the Assistant Secretary of Defense (Properties and Installations) established by Department of Defense directive 5105.1 dated 30 June 1953 shall, in addition to such responsibilities as may be hereafter assigned, have the following responsibilities:

1. Providing advice and assistance to the Secretary of Defense and his staff on matters pertaining to properties and installations.

2. Developing policies and procedures for the Department of Defense in the broad fields of real estate acquisition, utilization and disposal; construction; real property maintenance and management; and family housing. These responsibilities shall extend but be not limited to industrial production facilities, lands, housing, buildings, ports, bases, and all other installations which may come under the Department's supervision.

3. Initiating whatever action is necessary to insure the development of sound construction programs under appropriated and non-appropriated funds in the military departments including the need therefor, and the development of adequate information to substantiate such programs. Such actions may include but shall not be limited to the following:

* * * * *

c. Reviewing and integrating public works construction programs of the military departments to assure

that they are fully justified as to need in relation to strategic requirements, effective as to intended purpose and economical as to cost, type of building and location.

* * * * *

4. Reviewing the real property requirements of the military departments as to need.

* * * * *

8. Developing uniform plans and policies for the provision and administration of family housing of the Services, both for the Zone of the Interior and overseas.

9. Developing design standards and cost criteria for family housing, both permanent and temporary.

10. Developing procedures for the procurement of family housing.

* * * * *

12. Conducting continuing studies of family housing conditions and requirements and associated matters and report the results thereof and action thereon to the Secretary of Defense.

* * * * *

The Assistant Secretary of Defense (Properties and Installations) is hereby delegated the authority to obtain such reports and information from the military departments as are necessary to carry out his responsibilities and is authorized to request the military departments to issue the necessary directives to obtain such reports and information.

* * * * *

Directives recommended by the Assistant Secretary of Defense (Properties and Installations) which intend to change established policies or procedures will be signed by the Secretary or Deputy Secretary of Defense and their

implementation will be accomplished by the secretaries of the military departments or their designated agents.

* * * * *

/s/ C. E. WILSON
Secretary of Defense

Cancelled by DOD Directive 5126.22 of 30 Jan. 1961.

(Stamp)
U. S. COURT OF CLAIMS
Congress Constr. Co. vs. U. S.
No. 535-59. DEFT Exh. No. 96

(Plaintiff's Exhibit 7)

CERTIFICATION OF NEED FOR MILITARY HOUSING

(The original and a copy are to be filed with the FHA insuring office as an exhibit to the application for mortgage insurance under Title VIII of the National Housing Act)

Date 14 May 1953

To Federal Housing Administration

This certification is made in connection with an application for mortgage insurance to be filed with the FHA by the Mortgagee to finance the construction of a housing project, more particularly described in such application, and being identified as a proposed Military Housing Project for

Naval Air Station — Alameda, California
(Name of Military Installation) (Location)

Alameda Bayside Development Corporation I
1516 Oak Street, Alameda, California

"Bayside Apartments"
(Name of Project) (Sponsor)

Number of family units in multifamily structures: 500
Number of single-family structures:
Average gross monthly rental per family unit: $88.63
(includes all utilities except telephone)

In accordance with the provisions of Section 803 (b) (2) of Title VIII of the National Housing Act, the undersigned, as the duly authorized designee of the Secretary of Defense, hereby certifies that:

the above identified housing project is necessary to provide adequate housing for civilian or military personnel (including government contractors' employees)

assigned to duty at the military installation named above;

such military installation is deemed to be a permanent part of the Department of the Navy;

(Army, Navy, Air Force)

there is no present intention to substantially curtail the activities at such installation; and

based on the official records of the said Department, the military and civilian personnel who will be expected to occupy the dwelling units described above and for whom the project is intended, should be able to pay the proposed average monthly rentals per family unit as stated.

/s/ JOHN F. FLOBERG
John F. Floberg
Assistant Secretary of the Navy for Air

Stamp on back:
No. 535-59
U. S. Court of Claims
Congress Construction Co. vs.
United States
Pff's Exhibit No. 7